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In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD W. BERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether application of the forfeiture provision of the Organized Crime Control Act of 1970 (18 U.S.C. 1963) results in an impermissible forfeiture of estate.

2. Whether petitioner's sentence is invalid under the Double Jeopardy Clause.

3. Whether the Organized Crime Control Act of 1970, 18 U.S.C. 1961 *et seq.*, applies only to persons commonly regarded as "racketeers."

4. Whether petitioner's conviction should be reversed because the government's chief witness at trial was represented by the United States Attorney's former law firm.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 620 F. 2d 1026.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980 (Pet. App. 29a). A petition for rehearing was denied on May 29, 1980 (Pet. App. 30a). On June 24, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 28, 1980, and the petition was filed on that date.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of engaging in a pattern of racketeering activity (18 U.S.C. 1962(c)), 12 counts of mail fraud (18 U.S.C. 1341), and one count of obstructing a criminal investigation (18 U.S.C. 1510). He received a concurrent sentence on all counts of four years' imprisonment and a $15,000 fine. In addition, his interest in Buzz Berg Wrecking Company, Inc., was ordered forfeited pursuant to 18 U.S.C. 1963(a). The court of appeals reversed the conviction for obstructing a criminal investigation, but otherwise affirmed (Pet. App. 1a-28a).

The evidence at trial showed that from January 1968 to July 1976, petitioner participated in a scheme by which he and certain other demolition contractors in Baltimore insured that they received the City's demolition business at fixed and artificially inflated prices. Petitioner and the other contractors enlisted the aid of co-defendant Ottavio Grande, who was director of the city department

responsible for awarding demolition contracts.[1] Grande also had authority to award contracts for the removal of fire hazards on an informal bidding basis (Pet. App. 2a-3a). By collusion and use of confidential information provided by Grande, the contractors succeeded in obtaining contract awards at prices higher than the prices that would have resulted from true competitive bidding.

The evidence showed that Grande provided the group with the City's appraisal of the cost per cubic foot for each demolition project (Pet. App. 4a; Tr. 439, 442). From this information, petitioner and the other contractors were able to determine the maximum "low" bid that could be made without causing the City to reject the bids and readvertise the project (Pet. App. 4a). The group members then agreed to alternate as the "low" bidder, with the others either bidding larger amounts or refraining from bidding at all (*ibid.*). Grande was paid approximately five percent of each contract that was awarded pursuant to this scheme (*ibid.*). Petitioner and his co-defendants also took steps to maintain the effectiveness of their bid-rigging activities by coopting outsiders. Thus, when Andrew and Edgar Hawthorne, who owned a Philadelphia demolition company, began making legitimate bids for contracts, they were approached by the group (Tr. 1052) and were soon persuaded to join it (Pet. App. 12a-13a; Tr. 1064, 1066).

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[1]The other contracters were Joseph Tuller, Andrew and Edgar Hawthorne, Pietro Castagna, Charles Collison, Roland Larkin, Julius Hoffman, Harry Milzman, and C. Gordon Spielman. Co-defendants Tuller, Andrew and Edgar Hawthorne, Castagna, and Grande were convicted at trial on various charges resulting from their participation in the scheme. Tuller did not appeal. The convictions of Grande and Castagna were affirmed along with petitioner's conviction on appeal, while those of Andrew and Edgar Hawthorne were reversed. The remaining contractors testified as government witnesses at trial.

ARGUMENT

Petitioner's first three arguments concern the scope and application of the RICO statute, 18 U.S.C. 1961 *et seq.* No federal court has accepted any of these contentions, many have rejected them, and this Court denied review of three virtually identical claims in *Mandel* v. *United States*, No. 79-1029, cert. denied, April 14, 1980. There is no reason for a different result here.

1. Petitioner first contends (Pet. 12-18) that forfeiture of his interest in the business firm used in the bid rigging scheme constitutes a "forfeiture of estate" in contravention of Art. III, § 3, Clause 2, and the Eighth Amendment to the Constitution.

The common law doctrine of forfeiture of estate required surrender of the defendant's estate and chattels upon conviction of treason and certain other felonies. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). By contrast, as the Senate Committee on the Judiciary noted in explaining Section 1963, "the concept of forfeiture as a criminal penalty [is] limited in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and [does] not extend[] to any other property of the convicted offender * * *." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969). The Committee emphasized that the purpose of the forfeiture statute was to divest persons engaged in criminal activities of their interests in organizations acquired or operated through racketeering methods. *Id.* at 79-80; see *United States* v. *Rubin*, 559 F. 2d 975, 991-992 (5th Cir. 1977).

There is nothing novel about forfeiture statutes that operate in this fashion. Following adoption of the Constitution, Congress enacted statutes providing for forfeiture of many types of property that have been used

in the conduct of a criminal enterprise. See, *e.g.*, 15 U.S.C. 6; 21 U.S.C. 824(f); 26 U.S.C. 7301; 49 U.S.C. 781-783. Because the object of these forfeiture statutes is to penalize the commission of an offense against the law, they are deemed quasi-criminal in nature. *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). This Court repeatedly has affirmed application of such forfeiture statutes even when—in contrast to the present case—they visit a forfeiture on a property owner who has not himself used the property for criminal purposes. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 683; *Goldsmith-Grant* v. *United States*, 254 U.S. 505, 510-513 (1921).

Petitioner's claim (Pet. 14-17) that Section 1963 gives rise to a constitutionally impermissible *in personam* forfeiture is also without merit. It is, of course, true that the statute imposes a forfeiture directly upon a defendant following his conviction, rather than after a formally separate proceeding *in rem* against the offending property. But because both procedures are designed to penalize the commission of an offense and result in an identical forfeiture of the property involved in the criminal enterprise, there is "no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *United States* v. *Huber*, 603 F. 2d 387, 397 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980); see also *United States* v. *L'Hoste*, 609 F. 2d 796, 813 n.15 (5th Cir. 1980), petition for cert. pending, No. 79-1898; see also *Shaffer* v. *Heitner*, 433 U.S. 186, 207 n.22 (1977).

2. Petitioner next argues (Pet. 18-21) that his separate convictions under the RICO statute (18 U.S.C. 1961) and under the mail fraud statute (18 U.S.C. 1341) resulted in impermissible "multiple punishment" in violation of the

Double Jeopardy Clause as construed by this Court in *Whalen* v. *United States*, No. 78-5471 (Apr. 16, 1980).

While we wholly disagree with petitioner's discussion of this issue, there is no occassion to consider it here, since the issue is simply not presented by the sentence imposed on petitioner. He was sentenced, under the RICO count, to four years' imprisonment, a $15,000 fine, and forfeiture of his interest in the wrecking company. This sentence was well within the limits provided by the RICO statute. All of the sentences on the other counts on which petitioner was convicted were concurrent with the RICO sentence. Accordingly, petitioner was not cumulatively punished, regardless of whether the RICO and mail fraud counts are the "same" for constitutional or statutory purposes.

3. Petitioner also claims (Pet. 22-24) that the RICO statute, 18 U.S.C. 1961 *et seq.*, was intended to reach only "professional racketeers" or persons engaged in organized crime. That contention has been correctly rejected by every court that has considered it.[2]

While the stated purpose of the Organized Crime Act, of which RICO is a part, is to eradicate organized crime, the statute does not require proof that a defendant is connected with organized crime. *United States* v. *Aleman*, *supra*, 609 F. 2d at 304. The defendant's behavior, not his status, determines the applicability of the statute. See, *e.g.*, *United States* v. *Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United*

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[2]See *United States* v. *Aleman*, 609 F. 2d 298, 302-305 (7th Cir. 1979), certiorari denied, No. 79-1009 (Mar. 24, 1980); *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Chovanec*, 467 F. Supp. 41, 44-45 (S.D. N.Y. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa. 1979); *United States* v. *Mandel*, 415 F. Supp. 997, 1018 (D. Md. 1976). See also *United States* v. *Forsythe*, 560 F. 2d 1127, 1135-1136 (3d Cir. 1977).

States v. *Campanale*, *supra*, 518 F. 2d at 364. Thus, on its face, Section 1962(b) punishes anyone who, through a "pattern of racketeering activity," maintains an interest in or controls an enterprise engaged in interstate commerce. Section 1962(c) similarly prohibits conducting the affairs of an enterprise engaged in interstate commerce through a "pattern of racketeering activity." "Racketeering activity" is, in turn, defined to include violations of a number of federal criminal statutes, including the federal mail fraud statute. See 18 U.S.C. 1961(1). And "pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years * * * after the commission of a prior act of racketeering activity." 18 U.S.C. 1961(5). In short, Congress has enacted a comprehensive statutory scheme designed to punish "any person" who engages in a pattern of explicitly defined acts of racketeering. Nothing on the face of the statute suggests that, in addition to these requirements, its application is limited to persons engaged in "organized crime." See *United States* v. *Campanale*, *supra*, 518 F. 2d at 364; see also *United States* v. *Culbert*, 435 U.S. 371 (1978).[3]

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[3]The Act's legislative history confirms that it should be given the broad interpretation its terms command. While Congress's primary concern in enacting the statute was to cure the corruption of business enterprises and democratic processes by organized crime (see Congressional Statement of Findings and Purpose, P.L. 91-452, Section 1; 18 U.S.C. 1961 note), Congress also made it clear that the statute "shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, Section 904; 18 U.S.C. 1961 note. In keeping with its desire to assure liberal construction, Congress rejected suggestions that a definition of organized crime be added to the statute (see 116 Cong. Rec. 35343-35344 (1970)), preferring to provide the Attorney General maximum flexibility in effectuating its broad remedial objectives (116 Cong. Rec. 35302 (1970) (Remarks of Rep. Celler)). Congress's actions offer convincing evidence that it did not intend that some connection

4. Petitioner also contends (Pet. 24-25) that his conviction should be reversed because the United States Attorney's former law firm represented the chief government witness at petitioner's trial. This claim is without merit for the reasons explained by the court of appeals (Pet. App. 7a-8a). The U.S. Attorney submitted an affidavit to the district court confirming that he had recused himself from any decisions involving the witness. The two prosecutors in charge of the case also filed affidavits stating that the U.S. Attorney made no decisions concerning the witness and that the U.S. Attorney knew nothing of their own arrangements with the witness (see Pet. App. 7a-8a). Under these circumstances, the court below was correct in concluding (*id.* at 8a) that there was no "evidence of an appearance of impropriety." Further review of that factual issue is not warranted.

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with organized crime be demonstrated as a prerequisite to conviction. *United States* v. *Mandel*, *supra*, 415 F. Supp. at 1019. Had Congress intended that membership in organized crime be an element under the racketeering statute, it certainly would have defined the expression "organized crime," since "the highly subjective and prejudicial connotations of that term [] would simply render the statute unenforceable, a result plainly not in the contemplation of Congress." *United States* v. *Mandel*, *supra*, 415 F. Supp. at 1018-1019; see also *United States* v. *Culbert*, *supra*, 435 U.S. at 373-374.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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